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Supreme Court of the United States

OCTOBER TERM, ~~1947~~ 48

No. ~~643~~ 30

LELORD KORDEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Petitioner,

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OCTOBER TERM, 1947

No.

LELORD KORDEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, LELORD KORDEL, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered November 6, 1947, affirming his convictions under section 301 of the Federal Food, Drug, and Cosmetic Act [U. S. C., Title 21, §331], on June 27, 1946, respectfully shows:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

This proceeding was initiated by the filing of three criminal informations, comprising twenty counts, by the United States in the Eastern Division of the District Court of the United States for the Northern District of Illinois as causes Nos. 45 CR 488, 45 CR 490, and 46 CR 1. The informations charged generally that specified foods and drugs when introduced and delivered for introduction into interstate commerce were accompanied by certain circulars, which were alleged to be false or misleading, and such foods and drugs were, by reason thereof, *then and there* misbranded. Similarly, the only charge made against petitioner in said informations was the violation of section 301(a) of the Federal Food, Drug, and Cosmetic Act [U. S. C., Title 21, §331(a)] which reads as follows: "The following acts and the causing thereof are hereby prohibited: *(a)* The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded. * * *"

It is also material to note that petitioner was prosecuted by information and not by indictment.

The Separate Shipments of Food or Drug and Allegedly Misbranded Circular

In the counts of the informations mentioned in the footnote[1] the booklets, pamphlets, and circulars in no instance accompanied the product charged with being misbranded at the time it was introduced into interstate commerce. In

[1] Information 45 CR 488, Information 45 CR 490, Counts 5 and 6, and Information 46 CR 1, all counts.

addition, the products and printed matter were shipped from two different cities in Illinois. The time separating the shipment of the "misbranded" articles and the printed matter allegedly causing their misbranding ranged as follows: 2, 36, 41, 58, 71, 105, 188, and 561 days. For example, in one case (Information 45 CR 490, Count 6) the article was shipped on July 10, 1942, and the printed matter over 18 months later on January 18, 1944. No evidence was introduced by the Government that such printing matter ever accompanied the product in a physical sense, or that any consumer received the printed matter or relied, either in making the purchase or in using the product, upon the printed matter.

Circulars and Magazines Intended for Mailing by Dealer

Government Exhibits 8 and 24[2] bore post-office mailing permit indicia, together with space for addressing. The former was shipped 36 days *after* the articles with which they are now connected; the latter six months *before* the products. The sole purpose of their shipment to the dealers was for mailing to the dealers' lists (R. 145, 146, 161, 167, 335). Most, if not all, were actually mailed or addressed for mailing when seized, and, in both instances, the printed matter was generally held for addressing and mailing separate from the retail portions of the stores. The United States attorney at the trial pointed out that distribution of this printed matter constituted a violation of law unless the postal insignia were blocked out (R. 148). This had not been done.

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[2] The so-called *Gotu Kola* circular and and the magazine entitled "Health Today Spring 1945," involved in Information 45 CR 488 and Information 46 CR 1, Counts 1 to 12, inclusive.

The Booklets Priced for Sale and Independently Sold

Government's Exhibits 8A, 8B, and 8C are three so-called "Health Books," each plainly marked with the price thereof. All were sold by dealers independently of the sale of the products with which they are here connected; none was distributed to customers as advertising or labeling matter (R. 132, 146).

The Conviction and Subsequent Proceedings

Upon these facts the trial court filed its opinion on June 27, 1946 (R. 440-443, also reported in 66 F. Supp. 538), and judgment and sentence were pronounced on the same date.

An appeal was taken to the United States Circuit Court of Appeals for the Seventh Circuit. Upon appeal, in the court below, petitioner contended: (1) That booklets, pamphlets, and circulars, not physically accompanying a food or drug in interstate commerce, are not "labeling" as defined in, and hence are not subject to, the Federal Food, Drug, and Cosmetic Act; (2) that the booklets, pamphlets, and circulars did not accompany the articles when they were introduced or offered for introduction into interstate commerce as charged; (3) that Government's Exhibits 8 and 24 did not "accompany" any articles at any time in interstate commerce, or thereafter, but were intended for, and actually used as "mailing pieces"; (4) that a book or booklet, priced for sale and actually sold, does not "accompany" any article in interstate commerce, and does not constitute "labeling"; (5) that the trial court erred in holding that reference to a food, with honest and truthful qualifications as to its use and purposes, constituted an actionable representation that the food was a drug offered

for the cure, mitigation, treatment, and prevention of arthritis; (6) that the trial court erred in refusing to place a strict construction on the penal sections of the statute; (7) that the trial court erred in holding that the weight of proof requisite to conviction under the criminal provisions of the statute was similar to that required in the civil trial of a condemnation proceeding thereunder; (8) that in violation of his constitutional rights, defendant was prosecuted by information instead of by indictment; and (9) that the so-called "labeling" decisions relied upon by the trial court were not in point.

These contentions were rejected (R. 461 *et seq.*). The Circuit Court conceded that "no charge of falsehood is made as to the principal labels printed on the packages in which each is contained" but claimed that the test of whether printed matter "accompanies" an article is "not of physical contiguity but of textual relationship." It also found that misbranding takes places under the Act if "ignorant and gullible persons are likely to rely upon them instead of seeking professional advice." It implied that there is no distinction between "advertisements" and "labeling" under the Federal Food, Drug, and Cosmetic Act. Your petitioner's petition for rehearing was denied on or about January 22, 1948.

B

STATEMENT OF THE JURISDICTION OF THIS COURT

(1) STATUTORY PROVISION BELIEVED TO SUSTAIN THE JURISDICTION.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 [U. S. C., Title 28, § 347(a)].

(2) The Date of the Judgment to be Reviewed.

The judgment of the Circuit Court of Appeals for the Seventh Circuit affirming the conviction of petitioner was entered on November 6, 1947. A petition for rehearing, timely made, was denied on or about January 22, 1948. Petitioner's time to file this petition was extended to March 15, 1948, by order of Mr. Justice Murphy. This petition, and the certified record, are filed within the time so provided.

(3) Statement of the Nature of the Case and the Rulings of the Circuit Court of Appeals Bringing the Case Within the Jurisdiction of this Court.

The nature of the case (prosecutions under the Federal Food, Drug, and Cosmetic Act) has been heretofore stated. The Circuit Court of Appeals' rulings have heretofore been stated in part; it rejected your petitioner's contentions (R. 461). Each of such rulings is reviewable by this Court under the appropriate statutory provisions noted.

(4) Cases Believed to Sustain the Jurisdiction of this Court.

This Court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiorari.

C

THE QUESTIONS PRESENTED

(1) Is printed matter shipped from two to 561 days apart from the food or drug which it mentions by name "labeling" accompanying such article?

(2) Does printed matter shipped many months after the article is introduced into interstate commerce misbrand the article "when introduced and delivered for introduction into interstate commerce?"

(3) Does printed matter, shipped for mailing purposes by the dealer, accompany an article at the time it is "introduced and delivered for introduction into interstate commerce?"

(4) Do booklets, priced for sale and sold independently of an article, accompany such article at the time of the latter's shipment?

(5) Are the penal provisions of the Federal Food, Drug, and Cosmetic Act entitled to a strict construction?

(6) Is the burden of proof requisite to conviction under the criminal provisions of such statute similar to that required in the civil trial of a condemnation proceeding thereunder?

(7) Should petitioner have been prosecuted by indictment instead of information?

(8) Did the Circuit Court err in holding that labeling is false or misleading if the public is likely to rely upon statements contained therein instead of seeking professional advice?

D

Reasons Relied on for the Allowance of the Writ

(1) In ruling (R. 463 *et seq.*) that "labeling," as defined in the Federal Food, Drug, and Cosmetic Act, includes printed matter that does not physically accompany the food or drug when introduced into interstate commerce but matter rather of "textual relationship," the Circuit Court of

Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court, viz: *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510 (1916); *Weeks* v. *United States*, 245 U. S. 618 (1918); and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz: *Alberty* v. *United States*, 159 F. 2d 278 (1947); *Urbeteit* v. *United States*, 164 F. 2d 245 (1947); or if the ruling below is not in conflict with the foregoing decisions of this Court, as petitioner contends, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

(2) In ruling (R. 463 *et seq.*) that booklets and the like, not shipped at the time of the articles, "accompany" the articles when they are introduced or offered for introduction into interstate commerce, and consequently "then and there" misbrand them, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with the applicable decisions of this Court; viz: *United States* v. *Sullivan*, 92 L. Ed. Adv. Opinions 305 (decided January 19, 1948); *Weeks* v. *United States*, 245 U. S. 618 (1918); or if the ruling below is not in conflict with the foregoing decision of this Court, as petitioner contends, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court; and the Circuit Court of Appeals has rendered a decision expressly in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz: *Alberty* v. *United States*, 159 F. 2d 278 (1947); *Urbeteit* v. *United States*, 164 F. 2d 245 (1947).

(3) In ruling (R. 463 *et seq.*) that circulars and magazines shipped solely for mailing purposes, and booklets priced for sale and only sold "accompany" a food or drug at

the time of its introduction into interstate commerce, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with the applicable decisions of this Court, viz: *Weeks* v. *United States*, 245 U. S. 618 (1918); *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510 (1916); and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz: *Alberty* v. *United States*, 159 F. 2d 278 (1947); *Urbeteit* v. *United States*, 164 F. 2d 245 (1947); or if the ruling below is not in conflict with the foregoing decisions, as petitioner contends, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

(4) In implying (R. 466)[3] that petitioner was not entitled to a strict construction of the Act, with proof of the violation beyond a reasonable doubt, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with the applicable decisions of this Court, viz: *Kraus & Bros., Inc.* v. *United States*, 327 U. S. 614 (1946); *United States* v. *Resnick*, 299 U. S. 207 (1936) and cases cited *infra* in supporting brief; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz: *United States* v. *Crescent-Kelvan Co.*, 3 Cir., decided Jan. 26, 1948; *Alberty* v. *United States*, 159 F. 2d 278 (1947); or if the ruling below is not in conflict with the foregoing decisions, as petitioner contends, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

(5) In ruling (R. 467) that petitioner was properly prosecuted by information and not indictment, the Circuit Court of Appeals has decided a Federal question in a way

[3] The Circuit Court did make a perfunctory finding that the evidence sustained the charge beyond a reasonable doubt (R. 466).

probably in conflict with the applicable decisions of this Court, viz: *Macklin* v. *United States*, 117 U. S. 351 (1886); *Parkinson* v. *United States*, 121 U. S. 281 (1887); *Ex parte Brede*, 279 Fed. 147, *affirmed* 263 U. S. 4 (1922); or if the ruling below is not in conflict with the foregoing decisions, as petitioner contends, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court.

CONCLUSION

Each of the questions presented is of grave public importance. Unless the ruling below is reviewed, the law will be left in confusion. Prosecutions of this character are increasing in number, and the conflicts with this Court and between circuits are unmistakable. In addition, it is submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment of said Circuit Courts of Appeals be reversed by this Court, and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law.

LELORD KORDEL,
Petitioner.

By ARTHUR D. HERRICK
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Dated, New York, N. Y., February 18, 1948.

Supreme Court of the United States

OCTOBER TERM, 1947.

No.

LELORD KORDEL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 461 *et seq.*) has not yet been officially reported. The opinion of the district court is reported in 66 F. Supp. 538.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit affirming the conviction of petitioner was entered on November 6, 1947. A petition for rehearing, timely made, was denied on January 22, 1948. Petitioner's time to file a petition for a writ was extended to March 15, 1948, by order of Mr. Justice Murphy. The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 [U. S. C., Title 28, § 347(a)].

STATEMENT OF THE CASE

A statement of the case containing all that is material to the consideration of the questions presented has been set forth in the petition and in the brief. In the interests of brevity, it is not repeated here.

ARGUMENT

The principles of law relied on by petitioner, in support of his petition for a writ of certiorari may be summarized as follows:

I.

The entire tenor and philosophy of food and drug regulation under Federal statute centers about the *product* and its transportation in interstate commerce. Thus, misbranding is not unlawful in itself; it is the interstate shipment of an article that is at that time misbranded that constitutes the offense. *Weeks* v. *United States*, 245 U. S. 618, 622. Printed material, possessed of a distinct identity and character *apart* from a particular food or drug, thereby loses its basic essence as "labeling" and, moreover, fails to come within the jurisdiction of the Federal Food, Drug, and Cosmetic Act whose terms are confined to the article and only printed matter incidental to, dependent upon, and physically connected with, it. The concept of "textual relationship," conjured up by the Circuit Court (R. 464), breaches this fundamental principle since it is based on mental, rather than physical, association without reference to a particular shipment. Notwithstanding the conclusions of some lower courts, the theory of the regulation as a whole, the source of the statutory terminology, the phraseology of the definition, and the legislative history, all make

it clear that "labeling," as defined in section 301(m) [21 U. S. C. 321 (m)], is limited to printed matter physically accompanying a particular food or drug during its movement in the channels of interstate commerce. This is obviously true of adulteration (where the deterioration or defect must be associated with a specific product) and only loose thinking changes the rule in the case of misbranding. *Seven Cases of Eckman's Alternative* v. *United States,* 239 U. S. 510, 527; *United States* v. *Johnson,* 221 U. S. 488; *United States* v. *11 Packages of B. & M. External Remedy,* White and Gates *Decisions of Courts—Federal Food and Drugs Act,* pp. 1059, 1063; Senate Report No. 361, to accompany S. 5, 74th Cong., 1st Sess., pp. 2, 4; *Weeks* v. *United States,* 245 U. S. 618, 622; *Alberty* v. *United States,* 159 F. 2d 278; *Urbeteit* v. *United States,* 164 F. 2d 245.

II.

Where the violation charged is that the food or drug was, at the time of its introduction into interstate commerce, "then and there" misbranded, printed matter shipped days, months, and years from that time cannot be considered in judging whether the product was so misbranded. Section 301, subsections (a), (b), (c) and (k), makes a different offense of each step in the interstate journey of a product, all necessarily distinct and exclusive of each other (*United States* v. *Sullivan,* 92 L. Ed. Adv. Opinions 305, decided January 19, 1948) and misbranding *subsequent* to introduction into interstate commerce must be prosecuted as an offense of a different nature. This was not done in the case at bar, the evidence introduced being directed at offenses not charged. By analogy, a food that becomes adulterated after its introduction into interstate commerce cannot support a criminal charge against

the shipper, since, judged at the time of shipment, his hands are clean. The same rule is patently applicable to misbranding. The logic of the *Alberty* and *Urbeteit* opinions is more persuasive and obviously sounder than the Circuit Court's rulings in the case at bar. *Alberty* v. *United States*, 159 F. 2d 278; *Urbeteit* v. *United States*, 164 F. 2d 245; *Weeks* v. *United States*, 245 U. S. 618, 622; *United States* v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453, cert. den., Feb. 10, 1947; *United States* v. *Dotterweich*, 320 U. S. 277; *United States* v. *Sullivan*, 92 L. Ed. Adv. Opinions 305; *United States* v. *94 Doz., etc. Capon Springs Water*, 48 F. 2d 378; *United States* v. *J. L. Hopkins & Co.*, 199 Fed. 649; *United States* v. *5 Boxes of Asafoetida*, 181 Fed 561.

III

Although, in a broad sense, labeling may be considered a form of advertising,[1] nevertheless the two terms are, of course, not synonymous and a distinction has been recognized and drawn in various legislation.[2] Moreover, the fact that *labeling* may in some respects have the same purpose as advertisements does not conversely authorize the courts to characterize forthwith all *advertising* as "labeling." The Circuit Court overlooked the basic logic of this proposition when it ruled what was obviously advertising material to be labeling (R. 463). *Urbeteit* v. *United States*, 164 F. 2d 245.

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[1] This Court, for instance, in *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, said: "Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the articles to be sold . . ."

[2] Thus, the Federal Trade Commission Act, section 15 (a) [15 U. S. C. 55(a)] defines "false advertisement," expressly excluding labeling from the purview of the expression; and the Federal Alcohol Administration Act [27 U. S. C. 205(f)] generally defines "advertising," developing the definition in greater detail in the issued regulations. §61, Regulation 4.

IV

In implying that petitioner was not entitled to a strict construction of the Act, with proof of the violation, if any, beyond a reasonable doubt,[3] the Circuit Court abused one of the most elementary rules of criminal law, if not expressly, then in its mental concept of the weight of evidence. There can be no argument that in a criminal prosecution the Government throughout the trial has the *onus probandi*—the burden of proving beyond a reasonable doubt all the essential elements of the offense charged and the guilt of the accused. *United States* v. *Resnick*, 299 U. S. 207; *Holt* v. *United States*, 218 U. S. 245; *Agnes* v. *United States*, 165 U. S. 36. The rule is no different in criminal cases arising under the Federal Food, Drug, and Cosmetic Act. Indeed, in a recent decision of the Third Circuit, the Court reversed a conviction for the mere failure of the trial judge to so charge without ambiguity. *United States* v. *Crescent-Kelvan Co.*, 3 Cir. (decided January 26, 1948).

V

In prosecuting petitioner by information instead of indictment, the Government violated petitioner's constitutional right. He was charged with violation of section 301(a) [21 U. S. C. 331(a)], which sets forth only *one* offense, without regard to intent.[4] He was *penalized*, however, under section 303 [21 U. S. C. 333]—headed "PENAL-

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[3] The Court paid lip-service to part of the rule by concluding its discussion of the argument with the statement "We think there can be no doubt of the sufficiency of the evidence to sustain the charge beyond a reasonable doubt" (R. 466).

[4] This section reads: "*(a)* The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded."

TIES"—which subjects him to possible imprisonment for not more than *three* years "in case of violation of *any of the provisions of section 331,* with intent to defraud or mislead."[5] The crime is therefore an "infamous crime," requiring prosecution by presentment or indictment. Constitution, Fifth Amendment; *United States* v. *Moreland,* 258 U. S. 433; *Weeks* v. *United States,* 216 Fed. 292; *Falconi* v. *United States,* 280 Fed. 766; *De Jianne* v. *United States,* 282 Fed. 737.

CONCLUSION

For all the above reasons, a writ of certiorari should be granted, and this Court should review, and reverse, the decision of the Circuit Court.

Respectfully submitted,

ARTHUR D. HERRICK,
Attorney for Petitioner.

March, 1948.

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[5] This section, so far as is pertinent, reads: "*(a)* Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; . . . *(b) Notwithstanding the provisions of subsection (a) of this section,* in case of violation of any of the provisions of section 331, with intent to defraud or mislead, the *penalty* shall be imprisonment for not more than *three years,* or a fine of not more than $10,000, or both such imprisonment and fine." . . . [Italics added.]